

UNITED STATES OF AMERICA,

VS.

Defendant.

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here to underscore the particular importance of the court's role in enforcing the fundamental ambiguity doctrine – a standard which, for the reasons set forth in Dr. Xiao's Motion, is met here - in these circumstances.¹ In any event, Dr. Xiao agrees to refrain from affirmatively raising the issue of selective prosecution before the jury.

However, Dr. Xiao opposes any restriction on his ability to cross-examine government witnesses and witnesses claiming harm – *e.g.*, FBI agents or NSF employees – on issues of bias. It is well-established that “[p]roof of bias or motive to lie is admissible impeachment evidence.” *United States v. Salem*, 578 F.3d 682, 686 (7th Cir. 2009) (citations omitted); *see also United States v. Manske*, 186 F.3d 770, 777 (7th Cir. 1999) (“[Proof of bias] is the quintessentially appropriate topic for cross-examination.”). Courts routinely permit cross-examination of a witnesses’ bias. Indeed, some courts have permitted cross-examination regarding FBI agents’ or accusers’ (here, the NSF) racial or national origin bias for impeachment purposes. *See Chipman v. Mercer*, 628 F.2d 528, 532 (9th Cir. 1980) (“Examination for bias and prejudice must be permitted if it is reasonable to assume that animosity to a group might prejudice the witness, either consciously or unconsciously, against a defendant who shares the characteristics of that class”); *see also United States v. Pemberton*, 435 F. Supp.3d 250 (D. Me. 2020) (*holding that assuming African-American defendant presented proper foundation, evidence of police officers’ racial bias, presented through cross-examination, would likely be admissible*).

The cases upon which the government relies are inapposite. In *United States v. Tran*, 433 F. App'x 227, 234 (5th Cir. 2011), the court did not address the issue of the permissibility of impeaching a Government witness on the issue of racial bias, because the defendant “d[id] not allege that the court prevented him from impeaching any Government witness on the issue of bias.”

¹ Dr. Xiao reserves the right to argue for dismissal or acquittal based on selective prosecution if sufficient evidence of selective prosecution comes to light in advance of or during trial.

Tran, 433 F. App'x at 234. The government similarly misapplies *Infelise*, which held only that inquiries about whether government agents have targeted the defendants must be supported by a good faith basis and must not cross over the line into general allegations of selective prosecution. *United States v. Infelise*, No. 90 CR 87, 1991 WL 251654 (N.D. Ill. Nov. 14, 1991). Dr. Xiao should be permitted to establish witnesses' potential biases in any respect on cross-examination, as long as there is a good faith basis to do so.

2. The Government's Motion In Limine No. 2 (Evidence of Uncharged Offenses)

The government also moves *in limine* to preclude Dr. Xiao from arguing to the jury or presenting any evidence, on either direct or cross-examination, that the jury "could draw an inference from the fact that" defendant "was not charged with" other offenses. The defense does not oppose this motion, subject to the government opening the door to the issue. *United States v. Touloumis*, 771 F.2d 235, 241 (7th Cir. 1985) ("This circuit has held on numerous occasions that when a party questions a witness on a subject, even though that subject may not be strictly relevant to the case, the party cannot complain on appeal if the opposing party subsequently introduces evidence on the same subject.").

CONCLUSION

WHEREFORE, Dr. Xiao respectfully requests that these motions *in limine* be granted in part and denied in part.

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Respectfully submitted,

/s/ Ryan Poscablo

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2021 I electronically filed Defendant's Motion *in limine* with the Clerk of Court using the CM/ECF system which will send notification of such filing the following:

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